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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOYD SIMMONS, II, Hospitalman, U.S. Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether joinder of two unrelated and dissimilar criminal offenses for trial by court-martial, a practice permitted by military criminal law, but prohibited by Federal criminal procedure, casts substantial doubt on the ability of the court-martial members to render an impartial verdict on the more serious offense untainted by evidence admitted on the other and, thereby, denied petitioner due process of law under the fifth amendment to the Constitution of the United States.

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No. —

LOYD SIMMONS, II, Hospitalman, U.S. Navy,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Hospitalman Loyd Simmons, II, U.S. Navy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The decision of the United States Court of Military Appeals (App. 1a) is reported at 21 M.J. 38 (C.M.A. 1985). The opinion of the United States Navy–Marine Corps Court of Military Review (App. 2a) is an unreported decision, *United States* v. *Simmons,* No. 82 5474 (N.M.C.M.R. 30 Nov. 1983).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 20, 1985, affirming petitioner's conviction for murder. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law."

OTHER PROVISIONS INVOLVED

Paragraphs 30g and 33h of the *Manual for Courts-Martial, United States 1969* (Revised Edition) state: "Subject to jurisdictional limitations and at the discretion of the convening authority, charges against an accused, if tried at all, ordinarily should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment."

STATEMENT OF THE CASE

Pursuant to his authority under the Uniform Code of Military Justice (UCMJ),[1] the Commanding General, Marine Corps Air Station, Cherry Point, North Carolina, convened a general court-martial to hear the case against petitioner. Petitioner was charged with four offenses, two of which were dismissed by the military judge prior to trial on the merits. The remaining two charges were premeditated murder occurring on February 13, 1982, and an unrelated aggravated assault

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[1] Article 22, UCMJ, 10 U.S.C. § 822.

on November 20, 1981, violations of Articles 118 and 128 of the UCMJ, respectively.[2]

Prior to trial, the defense moved to dismiss the assault charge as being improperly joined with the greater offense of premeditated murder. The defense argued that petitioner could not receive a fair trial if these two unrelated incidents were tried together; the members of the court would not be able to keep the evidence of the different offenses totally separate in their deliberations. R. 9-10. This motion was denied. R. 12-13.

Petitioner was accused of the premeditated murder of George Mayo on February 13, 1982, by shooting him in the face with a pistol. He was convicted of unpremeditated murder by the members of the general court-martial. The petitioner contended that the killing was an accident and that he did not have the intent to kill the victim, Mayo.

Petitioner met the victim, Mayo, for the first time on the day of the shooting. R. 616. Mayo was a large man, 71 inches tall and weighing 250 pounds. P.E. 14. He was well muscled, very strong, and lean. R. 524-25. During the course of the evening, Mayo and a Marine named Sergeant Davis began arguing. R. 621-22. The victim hit Davis in the face with one punch (R. 625), putting Davis in the hospital for ten days and causing permanent injury to the nerves in the right side of his face. R. 431-32. A short time after being hit, Davis produced a gun and said he was going to shoot Mayo. R. 391, 626. Davis was drunk. A friend persuaded Davis to surrender the pistol, and it was eventually returned to Davis' van. R. 392, 405. Petitioner later

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[2] 10 U.S.C. §§ 918, 928.

removed the weapon from the van. Davis asked petitioner to give the gun to Davis' wife, but petitioner said he would give it to him the following day. R. 442. The gun was placed in petitioner's boot. R.442.

Petitioner later entered the house of a friend. Mayo was in the living room. R. 312. An argument ensued about Mayo's fight with Davis. R. 313. Mayo wanted to go outside, but petitioner did not want to go, and this occasioned some threats by petitioner to shoot Mayo. R. 317, 637. Petitioner eventually got up to leave, but Mayo pushed him back down. R. 316-17, 351, 636-37. Petitioner again got up, and Mayo began to push him down again. R. 317. The gun appeared in petitioner's hand, pointed at Mayo's face, and was fired from approximately fifteen inches away. R. 317-18.

Petitioner related that he was drunk at the time of the shooting. R. 643. He believed the pistol to be unloaded. R. 637. During his argument with Mayo, he took the gun out of his boot and placed it down beside him. R. 636. As he arose to leave the second time, Mayo pushed him again, grabbing his wrist and, while petitioner was resisting, the gun discharged. R. 639-40. The clip was not in the gun and petitioner did not know there was a round in the chamber. R. 640. He was not angry and had no intention to fight Mayo and did not intend to shoot him. R. 640.

Petitioner was also charged in the same charging instrument with an unrelated aggravated assault upon Jafas Haynes by striking him in the head with his fists causing grievous bodily harm. He was convicted of a simple assault of striking him in the head and face with his fists. This offense occurred on November 20, 1981.

Mr. Haynes was gathering supplies at the supply locker of the United States Naval Hospital, Marine Corps Air Station, Cherry Point, North Carolina. R. 531, 560. He was housekeeping supervisor at the hospital. R. 528. Petitioner worked at the supply locker as a supply clerk, and his duties involved monitoring outgoing supplies and comparing them with requisitions. R. 544, 604. Mr. Haynes claims that he was insulted by derogatory epithets and generally harassed by petitioner while attempting to depart the supply locker with his materials. R. 532. Petitioner impeded his exit by placing his foot on Haynes' supply cart, whereupon Haynes grabbed him around the shoulders and pulled him back. R. 533, 547. Petitioner fell to his knees, and Haynes held him down with his hands. R. 533, 550. After petitioner agreed to let Mr. Haynes leave, Haynes released his grip and, after a few threatening remarks, petitioner hit Haynes repeatedly in the face. R. 533-34.

Petitioner, on the other hand, claims that he did call Haynes derogatory names, but this was the way they always joked with each other. R. 607. He had never had any difficulty with Haynes in the past. *Id.* On this particular day Haynes was in a hurry, and he had more supplies than were authorized by the requisition form. R. 608-09. When questioned by petitioner, Haynes became angry and tried to leave. R. 609. An argument ensued, and Haynes grabbed petitioner by the throat and slammed his head against a nail on a nearby rack. R. 610-11. Haynes released his grip, but he again came at petitioner. R. 611. Petitioner claimed he only hit Haynes three times in the face, each strike occurring after Haynes first swung at him. R. 611-12.

After the defense case-in-chief, the Government presented the testimony of two witnesses in rebuttal. They both testified concerning petitioner's reputation for violence at the Naval Hospital where he worked. Dr. Noland, staff obstetrician and gynecologist, told the court members that petitioner had a reputation at the hospital as a violent man. R. 683, 689. Lieutenant Selak, clinical instructor, testified that petitioner was considered a violent person and that her personal opinion was that he was a violent individual. R. 693.

A mistrial was requested by the defense attorney who claimed that petitioner's character was not placed in issue by the defense case and that this character evidence had, in fact, eliminated the possibility of a fair trial on both charges. R. 699. The trial judge denied the request, and advised that the members of the court would be instructed that this character and opinion testimony related only to the aggravated assault charge. *Id.* The members of the court were so instructed. R. 751. The members were also instructed to "treat these two alleged incidences [sic] as completely independent and separate." R. 734.

After finding petitioner guilty of unpremeditated murder and simple assault, the court-martial members sentenced petitioner to reduction to the lowest enlisted pay grade (E-1), forfeiture of all pay and allowances, confinement at hard labor for twenty years, and a dishonorable discharge from the United States Navy.

The staff judge advocate for the convening authority presented his review of the court-martial prior to the convening authority's formal approval of the sentence.[3]

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[3] Article 61, UCMJ, 10 U.S.C. § 861.

The defense counsel again vigorously protested the joinder of the unrelated assault charge to the murder charge. He commented in his response to the staff judge advocate's review that the joinder of two separate offenses which are totally unrelated may have a detrimental effect on the fairness and integrity of the court. The convening authority nevertheless approved the sentence pursuant to his review of the case.[4]

Petitioner again complained to the United States Navy–Marine Corps Court of Military Review. The Navy–Marine Corps Court did not address the improper joinder issue, but nevertheless determined that, regarding the assault charge, the fact that petitioner testified that he never had any problems with the victim, Haynes, in the past, and that they were friends was insufficient to put in issue the peacefulness of petitioner so as to allow the Government to rebut with evidence of reputation for violence and violent character. App. 6a. Accordingly, the United States Navy–Marine Corps Court of Military Review dismissed the finding of guilty to the assault, but allowed the sentence to stand.[5]

Petitioner again complained to the United States Court of Military Appeals concerning this prejudicial joinder. The Court of Military Appeals granted the petition for review, but after the review, the court affirmed the findings and sentence.

Petitioner has followed all military and appellate procedures in raising the question of improper joinder and its substantial interference with his right to a

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[4] 10 U.S.C. § 860.

[5] Article 66, UCMJ, 10 U.S.C. § 866.

fair trial. The question was considered at trial and by all reviewing authorities. Petitioner's claim was rejected by all.

REASONS FOR GRANTING THE PETITION

Military procedures in effect at the time of petitioner's trial provided that existing charges against an accused should be tried at a single trial by the lowest court that has the power to adjudge an appropriate punishment.[6] One exception is that minor derelictions should not be joined with serious offenses.[7]

In *United States* v. *Keith,* 1 U.S.C.M.A. 442, 4 C.M.R. 34 (1952), the United States Court of Mili-

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[6] Manual for Courts-Martial, United States, 1969 (Revised Edition), para. 30(g). Manual for Courts-Martial rules are prescribed by the President pursuant to his authority to prescribe pretrial, trial, and post-trial procedures for cases triable in courts-martial. Article 36, UCMJ, 10 U.S.C. § 836. The President, by Executive Order 12473, 3 C.F.R. 210 (1984), has rescinded the Manual for Courts-Martial, United States, 1969 (Revised Edition), in effect at the time of petitioner's trial, replacing it with the Manual for Courts-Martial, United States, 1984, effective August 1, 1984. The new joinder rule, found in Rule 601(e)(2) of the Rules for Courts-Martial, provides that, "In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related." The rationale for this rule is stated that, "This rule is inconsistent with Fed. R. Crim. P. 8(a), which requires (in general) separate trials for each offense. Such a requirement is too unwieldy to be effective, particularly in combat or deployment. Joinder is entirely within the discretion of the convening authority." Analysis, Appendix 21, R.C.M. 601, Manual for Courts-Martial, United States, 1984.

[7] Manual for Courts-Martial, United States, 1969 (Revised Edition), paragraph 26(c).

tary Appeals approved the practice of joining unrelated charges for trial at the same court:

> [T]he joinder of entirely separate, distinct, and completely unrelated offenses is not condemned by military procedure. Instead, for practical reasons of dispatch it has come to be the customary practice to join all known offenses against an accused and to dispose of all at a single trial. See Manual for Courts-Martial, supra, paragraph 30f. However, in civilian practice it is unusual, and often improper, to join unrelated offenses in the same trial. See Rule 8(a), Federal Rules of Criminal Procedure, 18 U.S.C. Rule 8(a). This rule provides in substance that several offenses may be charged in separate counts of the same indictment, if the offenses are of the same or similar character, or are based on the same transaction, or on two or more connected transactions, or transactions constituting parts of a common scheme. No such limitation exists in the sphere of military practice.

Keith, 1 U.S.C.M.A. at 448, 4 C.M.R. at 40. This practice has been followed and repeatedly affirmed. *See United States* v. *Lockwood,* 15 M.J. 1, 8 (C.M.A. 1983); *United States* v. *Showalter,* 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965); *United States* v. *Smith,* 4 M.J. 809, 813 (A.F.C.M.R. 1977); *United States* v. *Carter,* 4 M.J. 758, 760 (A.C.M.R. 1977); *United States* v. *Partridge,* 41 C.M.R. 548 (A.C.M.R. 1969).

The military practice of permitting convening authorities to charge unrelated offenses in the same charging instrument had one primary effect under the facts of this case. That effect was establishing the likelihood that, because petitioner had engaged in an assault three months earlier, he more likely than not intended to murder George Mayo. This permissive

joinder practice proved a windfall to the Government in petitioner's case. The direct evidence on the assault charge tended to show that petitioner was a individual prone to commit offenses against the person of another. This evidence, combined with the admission on the assault charge of the reputation and character evidence as to petitioner's violent nature, ensured his conviction of a murder occurring one-quarter of a year later irrespective of his claim of accident. The military judge's instructions to the members of the court-martial directing them to keep the evidence on the two charges separate in their minds was fruitless.

The critical issue in dispute in petitioner's murder case was whether he possessed the requisite intent to kill. The reasonable possibility of prejudicial taint from the admission of all the evidence erupting from the unrelated assault charge is self-evident. There are basic and fundamental principles of American jurisprudence that have been violated here that are so grave as to deprive petitioner of due process of law guaranteed to him under the fifth amendment. In *McElroy* v. *United States*, 164 U.S. 76 (1896), at 79-80, this Court, in construing Rev. Stat. § 1024 (1875),[8] stated:

> [I]n our opinion, they [indictments for arson and assault] were not for two or more acts or transactions of the same class or crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other,

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[8] The forerunner of Rules 8(a) and 14 of the Federal Rules of Criminal Procedure.

> committed at different times, and not provable by the same evidence. In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction.

Additionally, this Court has not hesitated, in the exercise of its supervisory powers over the Federal courts, to provide relief when members of the jury are exposed to inadmissible, derogatory criminal information so prejudicial that new trials were warranted. *Marshall* v. *United States,* 360 U.S. 310 (1959). Petitioner is not asserting mere prejudice. He is claiming that he was deprived of a fair trial.

Evidence of the commission of unrelated crimes by a defendant has traditionally been inadmissible to show guilt or that the defendant would be likely to commit the crime with which he is charged. 1 Wharton's *Criminal Evidence* § 232 (12th ed. 1955); Underhill's *Criminal Evidence* § 180 (4th ed. 1935). The military joinder procedure is an easy way to circumvent this longstanding precept that evidence of other crimes is not admissible to prove commission of the crime charged. "If the admission of evidence pertaining to crimes of which the defendant has been convicted is improper due to the prejudice which might result to the defendant's case, then how much more compelling should be the policy behind refusing to allow the admission of evidence pertaining to crimes of which the

defendant has merely been *accused*!" (emphasis added).[9]

The joinder of unrelated offenses has the same effect on the jury as evidence of other crimes whose only relevance is to show propensity to commit criminal acts. The Fourth Circuit found joinder of two bank robberies improper when they occurred two and one-half months apart. The court claimed that:

> One inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another. If the rationale of the 'other crimes' rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of other crimes.

United States v. *Foutz,* 540 F.2d 733, 736 (4th Cir. 1976). In *Drew* v. *United States,* 331 F.2d 85 at 88 (D.C. Cir. 1964), Judge McGowan wrote:

> The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hos-

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[9] Note, *Joinder of Criminal Offenses in Nebraska: Judicial Discretion v. Fair and Impartial Trial,* 56 Neb. L. Rev. 399, 404 (1977).

tility engendered by the charging of several crimes as distinct from only one.

Under some circumstances, there exist legitimate purposes for admission of the prior criminal acts of an accused. Such is not to demonstrate general criminal propensity, but to establish intent, prove an element of the crime, show identity, malice, motive, or a system of criminal activity, or when the defendant has raised the issue of his character or when he has testified and the Government seeks to impeach credibility. *See Spencer* v. *Texas,* 385 U.S. 554, 560-61 (1967). Similarly, joinder of offenses is considered proper for the speed, efficiency, and convenience in the functioning of Federal judicial machinery, but only as long as the right of the defendant to a fair trial is preserved and no substantial prejudice to the defendant occurs.[10] *Cataneo* v. *United States,* 167 F.2d 820, 823 (4th Cir. 1948) (analyzing Rule 8, Federal Rules of Criminal Procedure). Rule 8(a) of the Federal Rules of Criminal Procedure,[11] therefore, limits joinder to offenses

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[10] The argument that judicial economy and efficiency are served in joining offenses of the same or similar character under Rule 8(a), Federal Rules of Criminal Procedure, has been questioned when compared with the dangers of unfairness to a defendant. *United States* v. *Halper,* 590 F.2d 422, 430 (2d Cir. 1978); *United States* v. *Foutz,* 540 F.2d 733, 738 (4th Cir. 1976). Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 Hofstra L. Rev. 533, 537-38 (1978). Comment, *Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure,* 74 Yale L.J. 533, 560 (1965).

[11] Rule 8(a) of the Federal Rules of Criminal Procedure reads:

> Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for

of the same or similar character,[12] offenses based on the same act or transaction, or offenses based on more than one transaction connected together or constituting part of a common scheme or plan. It does not allow joinder of unrelated offenses. In military practice, the rationale for the permissive joinder of unrelated charges in the same charging instrument is described as "practical reasons of dispatch." *Keith*, 1 U.S.C.M.A. at 448, 4 C.M.R. at 40. This rationale has been defined more explicitly to mean that a separate trial for each offense is a procedure "too unwieldy to be effective, particularly in combat or deployment." Analysis, app. 21, R.C.M. 601, *Manual For Courts-Martial, 1984.*

Unlike the sundry and legitimate reasons for admission of proof of a defendant's prior criminal acts, and unlike the permitted joinder situations under the Federal rule, the joinder of unrelated offenses has little purpose under the circumstances of this case other than prosecutor convenience. The murder charge is completely and utterly irrelevant to the assault charge, and the evidence as to each is irrelevant to the other. This was a conventional criminal trial held in North

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each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

[12] Serious and responsible criticism exists, disapproving of the procedure of joining two or more offenses of the same or similar character under Rule 8(a). Such joinder provides too great a risk of prejudice to an accused. *McElroy* v. *United States*, 164 U.S. 76, 79-80 (1896); *Halper, supra* n. 10 at 430-431; *Foutz, supra* n. 10 at 736; *Drew* v. *United States*, 331 F.2d 85, 88 (D.C. Cir. 1964).

Carolina, and cannot reasonably be considered as conducted under circumstances of "military necessity" where "practical reasons of dispatch" compel a single, rapid, proceeding disposing of all existing charges against an accused. In petitioner's proceeding, the military rule of joinder purposely prejudices petitioner for no justifiable reason.

Under conditions of combat or extended deployment of operational units, this military rule of permissive unrelated offense joinder may be proper and legitimate, but under the circumstances of this case, this joinder rule combined with the court-martial's extensive and prejudicial evidentiary presentations, deprived petitioner of a fair trial and thus, due process of law. This Court has opined that otherwise proper and legitimate criminal rules may be applied to a defendant in such a manner and under such circumstances as to deprive him of a fair trial. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). A "rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

This Court has promulgated no formal rule for identifying deprivations of due process of law:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.

Betts v. *Brady*, 316 U.S. 455, 462 (1942). The totality of the facts in petitioner's case reveals that all the evidence presented on the assault charge denied him a fair opportunity to defend against the murder

charge; the presumption of innocence was reasonably jeopardized. How can the members of the court-martial, when considering the murder charge, fairly and impartially deliberate on the element of "intent to kill" when those same members have been told that this defendant so provoked a hospital employee to engage in a fight during which the defendant struck the employee repeatedly about the face? How can those court-martial members impartially consider the element of "intent to kill" when they had been improperly told that this defendant has a reputation for violence and is a violent person? No defense of accident, no matter how strong or convincing, could overcome the bias created. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

The military judge's instructions to keep the offenses separate cannot remedy the obvious effects of the evidence admitted on the assault charge. Quoting old maxims, Circuit Judge Gewin in *Dunn* v. *United States*, 307 F.2d 883 (5th Cir. 1962), proclaimed anew, "[O]ne 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.' " *Id.* at 886. Realistically, when a juror is faced with deciding on whether petitioner possessed an intent to kill George Mayo, it is impossible to remove from that juror's mind evidence from two impressive medical professionals testifying that petitioner's reputation is one of violence and that he is a violent person.

The rationale behind the ban on "other crimes" evidence and the arguments against joinder of unrelated and dissimilar offenses are the same. They both prejudice the minds of the factfinders so that a verdict on a particular charge is based on more than just the evidence presented on that charge. Impartiality is gone. The Supreme Court has held that a grossly improper and pervasive prejudicial influence on the factfinders of a criminal trial will cause a deprivation of the due process guaranteed to a defendant. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court found such a prejudicial influence where the trial judge failed in his duty to protect the defendant from inherently prejudicial publicity saturating the community and to control the disruptive influences in the court room. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Id.* at 362. Similarly in *Estes* v. *Texas*, 381 U.S. 532 (1965), this Court, in reversing the defendant's conviction, determined that the permission given to televise and broadcast this widely publicized and notorious criminal trial denied the defendant due process of law. Justice Clark wrote: "Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 542-43. In *Estes*, the probability that such publicity affected the jury was so great under the circumstances of that case that the "appearance of justice" was obliterated. Again the impartiality of the factfinders was guaranteed. A strong influence on the *Estes* Court was Chief Justice Taft's 1927 decision in *Tumey* v. *State of Ohio*, 273 U.S. 510 (1927). In *Tumey*, the trial judge, who was also the village mayor, had a direct, personal, and substantial pecuniary interest in reaching a decision

against the defendant. Chief Justice Taft asserted that any procedure which "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.* at 532. This Court has repeatedly affirmed the inviolability of the factfinder's impartiality and upheld a defendant's right to due process of law when this impartiality was compromised.

By affirming the decision of the United States Navy-Marine Corps Court of Military Review, the United States Court of Military Appeals decided an important question of fairness and due process in military proceedings. That decision has ensured that military servicemen and women will be subject to trial on as many unrelated charges as the Government can amass, thereby depriving them of their right to be tried on the facts of each charge of which they are accused, unaffected by extraneous evidence.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 48380/NA

CMR Dkt. No. 82-5474

UNITED STATES, *Appellee*

v.

LOYD SIMMONS, II (463-90-7521), *Appellant*

ORDER

Upon further consideration of the granted issues, it is by the Court this 20th day of September, 1985,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (OTTIE)
Appellate Government Counsel (STRATTON)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

BEFORE

A. W. EOFF II MICHAEL D. RAPP A. F. MIELCZARSKI

UNITED STATES

v.

LOYD SIMMONS, II, 463 90 7521, Hospitalman (E-3),
U. S. Navy

NMCM 82 5474 Decided 30 November 1983

Sentence adjudged 29 June 1982

Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commanding General, Marine Corps Air Station, Cherry Point, North Carolina 28533

LCDR Georgia L. Winstead, JAGC, USNR, Appellate Defense Counsel

LCDR Robert T. Gerken, JAGC, USN, Appellate Government Counsel

PER CURIAM:

Appellant was tried by general court-martial consisting of members. He was found guilty contrary to his pleas of unpremeditated murder and assault and battery under Articles 118 and 128, Uniform Code of Military Justice (UCMJ). He was sentenced to confinement at hard labor

for 20 years, to be reduced to pay grade E-1, to forfeit all pay and allowances and to be discharged from the service with a dishonorable discharge. The convening authority approved the findings and sentence without change. Appellant assigns ten errors, three of which we will discuss (I, II, and V).

I

The Appellant Was Denied His Right To An Impartial Panel Of Court Members.

Thirteen members were originally named to the court by the convening authority. After more than a day of voir dire, seven members had been excused for cause and the prosecution and defense had each exercised a peremptory challenge reducing the panel below a quorum to four. The convening authority appointed four new members. One of those members was also excused for cause. Appellant's counsel sought an additional peremptory challenge against the newly appointed members but it was denied by the military judge. Appellant has assigned as error the military judge's failure to grant five of the defense challenges for cause and his refusal to give the defense an additional peremptory challenge. Colonel Gress and Lieutenant Colonel McMullin were challenged based on their bias towards the credibility of prosecution witnesses and because Colonel McMullin had read newspaper articles about this case. Warrant Officer Gaskell was challenged on a supposed predisposition to reject an intoxication defense and his having read a newspaper article on the murder of Mayo. Major Palmer was challenged on a number of grounds ranging from his having overheard a discussion about a superior being excused from the court to his religious beliefs concerning the death penalty. Major Stimler was challenged on five grounds extending from his hostile demeanor toward defense counsel to his opinions about drinking and drinkers.

The decision to grant challenges for cause is imparted to the military judge. Article 41(a), (b), UCMJ, 10 U.S.C. § 841(a) (1976); *United States v. Harris*, 13 MJ 288 (CMA 1982). The test which the military judge must apply in reaching his decision was set out by the Court of Military Appeals in *United States v. Parker*, 6 USCMA 274, 19 CMR 400 (1955). That test is whether the court member "is mentally free to render an impartial finding and sentence based on the law and the evidence." *See United States v. Boyd*, 7 MJ 282 (CMA 1979). Appellate courts will reverse judges' decisions on challenges, only when there is a clear abuse of discretion. *Boyd, supra* at 282; *United States v. Deain*, 5 USCMA 44, 17 CMR 44 (1954). After a careful study of the voir dire and applying the tests as set out above, we conclude that the military judge correctly disallowed the challenges for cause. We also find that the military judge ruled correctly when he denied the appellant an additional peremptory challenge against the newly appointed members.

II

The Evidence Was Insufficient To Establish Appellant's Guilt Of Unpremeditated Murder Beyond A Reasonable Doubt.

The victim Mayo was a civilian who had come to Marine Corps Air Station, Cherry Point, to help his brother-in-law Corporal Simmons move his household goods. Mayo was going to spend the night at the quarters of Corporal Taylor, a nearby neighbor of Corporal Simmons. At about 2000 on the evening of his death, Mayo was at the Taylor home with Corporal Taylor and his wife. Appellant and his friend Sergeant Davis came to the Taylor home to visit, later to be joined by another neighbor Corporal Flowers. An argument broke out between Mayo and Sergeant Davis. At the insistence of Corporal Taylor, Mayo and appellant moved into the back yard. Appellant indicated if there was to be a fight, they would have to fight him first. Davis came into the back yard and was punched

in the face by Mayo. Davis produced a pistol from his van and stated he intended to shoot Mayo. Appellant took the pistol away from Davis and later told Davis he would return the pistol to him in the morning. Appellant thereafter placed the pistol in his boot. Later that night appellant went to Corporal Taylor's home to pick up his coat. Mayo was now sleeping in the living room. Appellant and Mayo started to argue as to why Mayo had hit Sergeant Davis. Mayo suggested they go outside and fight. Mayo was a much larger man than appellant. Appellant indicated he was going to leave, but Mayo pushed him back on the sofa when he stood. Appellant stated "don't push me no more or I'll shoot you." Mrs. Taylor had seen the pistol in appellant's left hand, against his left leg, while he sat on the sofa. Appellant again attempted to stand only to be pushed back by Mayo. The pistol discharged and the bullet hit Mayo in the lower left eye lid. Appellant fled the Taylor home, going to the home of Sergeant Davis and his wife. Appellant told Mrs. Davis to get rid of the pistol he was holding and to give him a ride. She refused to give him a ride but took the pistol and put it in a dresser drawer. Appellant entered Sergeant Davis' van parked in front of the house, where he was apprehended by the Naval Investigative Service later in the morning.

The issues of self-defense, accident, provocation, and negligence were presented to the members, who rejected them and found appellant guilty of unpremeditated murder. We find that there was sufficient evidence to sustain the members' finding, and we reject this assignment of error.

III

The Military Judge Erred To The Substantial Prejudice Of The Appellant By Allowing The Trial Counsel To Introduce Evidence Of The Appellant's Bad Character For Peacefulness.

Upon conclusion of the defense case, the military judge permitted the Government to call two witnesses in rebuttal

who testified that the appellant had a reputation in the hospital community where he worked as a violent person. Military Rules of Evidence 404(a)(1) permits the Government to rebut evidence of a pertinent character trait of the accused offered by an accused. No guidance has been supplied as to what constitutes evidence of a character trait, so as to raise the issue and permit the prosecution to rebut. Appellant testified that he had never had any problems with Mr. Haynes in the past, that they were friendly and that he only struck Mr. Haynes because he was trying to hurt him. We hold that this was insufficient to put in issue the peacefulness of appellant so as to allow the Government to rebut. The military judge, therefore, erred when he allowed opinion evidence to the effect that appellant's reputation at the hospital where he works was that of a violent person. However, the military judge specifically instructed the members that they were to disregard this testimony as to Charge I, since the evidence was admitted only as to Charge II, the assault and battery at the hospital. We can presume the members did as instructed. *United States v. Hurt*, 9 USCMA 735, 27 CMR 3 (1958). In view of the military judge's limiting instruction, we find that the error goes only to Charge II and its specification.

V

The Instructions Of The Military Judge On Self-Defense On The Murder Charge Were Insufficient And Misleading Where They Focused Only On The Self-Defense Test Which Would Justify Use Of Deadly Force And Failed To Address Self-Defense In Use Of Less Than Deadly Force Which Unexpectedly Results In Death.

The evidence of record established that during the period leading up to the shooting, appellant did not brandish the pistol at the victim at any time. To the contrary, the appellant's own testimony indicates that he was only attempting to put the pistol in his back pocket when it went off.

The military judge instructed the members on the use of a weapon as a deterrent and distinguished such a use from one in which the appellant may have feared grievous bodily harm was about to be inflicted upon him, thus allowing him to use deadly force in self-defense. The military judge's instructions were very detailed and more inclusive than was dictated by the evidence. We find no merit in this assignment of error.

We find that the remaining assignments of error are without merit. The findings of guilty to Charge II and its specification are disapproved. In view of the fact that appellant was found guilty only of an assault consummated by a battery, a relatively minor offense in comparison to unpremeditated murder, we do not believe that a rehearing is in the interests of justice or judicial economy. Charge II and its specification as modified by the findings of the Court are therefore dismissed. Article 66(d), UCMJ. Upon reassessment we find the sentence appropriate for the remaining findings of guilty to unpremeditated murder. Accordingly, the remaining findings of guilty and the sentence as approved on review below are affirmed.

/s/ Albert W. Eoff II
Albert W. Eoff II, Chief Judge

/s/ Michael D. Rapp
Michael D. Rapp, Judge

/s/ A. F. Mielczarski
A. F. Mielczarski, Judge

Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-857

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOYD SIMMONS, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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QUESTION PRESENTED

Whether joinder of unrelated charges of premeditated murder and aggravated assault for trial by court-martial is consistent with due process where the court-martial members were instructed specifically as to which evidence was relevant to which of the two charged offenses and the record establishes that the members followed the instructions.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-857

LOYD SIMMONS, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a) is reported at 21 M.J. 38. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 2a-7a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 20, 1985. The petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was charged with premeditated murder and aggravated assault. He was convicted by a general court-martial convened by the Commanding General, Marine Corps Air Station,

Cherry Point, North Carolina, of the lesser included offenses of unpremeditated murder and assault consummated by a battery, in violation of Articles 118 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 928. The court-martial members sentenced petitioner to a dishonorable discharge, confinement at hard labor for 20 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review affirmed the findings of guilty on the unpremeditated murder offense, but disapproved the findings of guilty on the battery offense and dismissed that offense (Pet. App. 2a-7a). Upon independent reassessment, the court found the original sentence appropriate for the remaining findings of guilty on the unpremeditated murder conviction (*id.* at 7a). Upon discretionary review pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the United States Court of Military Appeals affirmed without opinion (Pet. App. 1a).

1. On November 20, 1981, petitioner was involved in a fist-fight with Jafas Haynes. The incident was investigated informally, and on February 9, 1982—four days before petitioner fatally shot George Mayo—the convening authority referred a charge of aggravated assault by petitioner against Haynes to trial by special court-martial. On February 23, 1982, after learning that petitioner was suspected of murdering George Mayo, the convening authority withdrew the aggravated assault charge from the special court-martial because he felt obliged to refer all known charges to one forum (Tr. 6). Thereafter, the convening authority referred the murder and aggravated assault charges to a formal pre-trial investigation, pursuant to Article 132, UCMJ, 10 U.S.C. 932. Acting on the recommendation of the pre-trial investigating officer, the

convening authority then referred both charges to a general court-martial.[1]

At a pre-trial hearing, petitioner moved for severance of the murder and aggravated assault charges. The motion was denied. Tr. 12-13. Following presentation of the government's case in rebuttal, petitioner moved for a mistrial, alleging that character evidence introduced by the government in connection with the assault charge would be considered by the court-martial members on the murder charge. The trial judge denied the motion, concluding that a limiting instruction would be sufficient to prevent any prejudice to petitioner. Tr. 699, 734, 751.

2. With respect to the murder charge, the issue at trial was whether petitioner deliberately fired the pistol or whether it was discharged accidentally when the victim allegedly grabbed petitioner's wrist. Petitioner's only evidence on this issue was his own testimony. Petitioner testified that the pistol was discharged unintentionally when the victim pushed petitioner with one hand and grabbed petitioner's wrist with the other (Tr. 639-640). Petitioner's testimony was contradicted by his written confession, in which he stated that Mayo "shoved me in the chest with both hands. It was hard. My arms swung up and the pistol went off" (PX 11). In addition, an eyewitness to the shooting, a friend of petitioner's who observed the shooting from a very short distance, saw only petitioner's hand near the pistol as petitioner pointed the pistol at the victim and fired (Tr. 317-318). The eyewitness testified that the victim pushed petitioner on top of his shoulders with *both* hands, petitioner produced the pistol, pointed it, and fired (*ibid.*).

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[1]Nothing in the record even remotely suggests that the two offenses were joined by the convening authority in order to demonstrate general criminal propensity, to amass charges for prosecutorial convenience, or for any other improper purpose.

Finally, a firearms expert testified that accidental discharge by jarring would be highly improbable because of the half-cocked notch safety feature on the murder weapon (Tr. 503-504). Discharge of the weapon would require a steady force applied on the trigger (Tr. 504). The murder weapon had an 8-¼ pound trigger pull, a trigger pull considered to be heavy (Tr. 496-497). By comparison, the trigger pull on the .45 caliber military-issue pistol is about 5 to 6-½ pounds (Tr. 496).

Petitioner's defense with respect to the aggravated assault charge was self-defense (Tr. 610-612, 671-673). On rebuttal, the government produced two witnesses who testifed that petitioner had a reputation for violence at the naval hospital where he worked (Tr. 683, 689, 693).

ARGUMENT

The decision of the United States Court of Military Appeals is correct and involves only a narrow question of military procedure that has no impact outside of the military justice system. Petitioner acknowledges the fact that the military rule on joinder of offenses is different from the civilian rule contained in Fed. R. Crim. P. 8. But petitioner does not contend that the military rule was violated in this case; rather, his principal argument appears to be that the military *should*, as a matter of policy, employ a joinder rule that more closely approximates the civilian rule. In the absence of any claim that the military rule violates constitutional rights, however, petitioner's arguments are addressed to the wrong forum. As we demonstrate below, the Constitution entrusts to the President and Congress the authority to prescribe rules governing courts-martial. It is not open to the civilian courts to prescribe different rules simply on the basis of policy preferences. Accordingly, review by this Court is not warranted.

1. a. As petitioner notes (Pet. 8-9), military procedures in effect at the time of his court-martial provided that, with the exception of minor derelictions, all charges against an accused "ordinarily should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment." *Manual for Courts-Martial, United States—1969* ¶ 30*g* (rev. ed.). See also *id.* ¶¶ 26*c*, 33*h*.[2] This long-standing military preference for joinder of all known offenses at a single trial serves essential military purposes that have no counterpart in civilian society.[3]

The essential business of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). The aim of the peacetime military is to maintain its units honed to the razor's edge of preparedness through training exercises and simulations of combat conditions. An integral part of that preparedness is reliance on a military justice system that functions as effectively in times of war as in peacetime.

Courts-martial, while of critical importance to the maintenance of discipline, are a decidedly secondary function of the military. "To the extent that those responsible for performance of this primary [fighting] function are diverted

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[2]The current edition of the *Manual* contains an essentially similar provision. See *Manual for Courts-Martial, United States—1984*, Rule 601(e)(2), discussed at pages 7-8, *infra*.

The *Manual* is promulgated by the President pursuant to his constitutional authority as Commander-in-Chief of the Armed Forces (U.S. Const. Art. II, § 2) and pursuant to a statutory delegation of Congress's power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14). Article 36, UCMJ, 10 U.S.C. 836, delegates to the President authority to prescribe procedural and evidentiary rules governing trial by court-martial.

[3]The precise origins of the military joinder rule are unknown, but it existed long before the enactment of the UCMJ or the promulgation of the Federal Rules of Criminal Procedure. See App., *infra*, 6a-7a.

from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Quarles*, 350 U.S. at 17. The military joinder rule results in fewer courts-martial. Fewer courts-martial enhance military readiness by:

1. Minimizing diversion of servicemembers' time from their primary military assignments and their training;
2. Promoting unit integrity and cohesion by minimizing the occasions when servicemembers are absent from their units; and
3. Enhancing morale and discipline by providing prompt and visible remedies for crimes and breaches of discipline.[4]

In these circumstances, the President as Commander-in-Chief could rationally conclude that diversion of the additional resources necessary to conduct several trials in lieu of one is too high a price to pay in terms of lost military preparedness. Petitioner has not demonstrated the "extraordinarily weighty" considerations necessary to overcome this long-standing Presidential judgment. See *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

b. Petitioner nevertheless argues (Pet. 15) that the military joinder rule should be limited to "conditions of combat or extended deployment of operational units." Such a rule would be totally unworkable. Navy ships, for example, whether underway for routine training off the coasts of the United States or deployed to distant places,

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[4]This last function is particularly crucial in the naval services, where the offender and victim, often confined on a relatively small ship or living in a relatively small unit, must not only eat, sleep, and live closely together, but must also work together as part of a cohesive, combat-ready unit.

essentially operate no differently during peacetime than during times of war. Marine air-ground combat teams and Navy ships are deployed continuously to remote locations in regular, frequent cycles, interrupted only by brief intervals at a home base to re-equip, repair, and train for the next deployment. Piecemeal disposition of offenses obviously would interrupt the training and deployment cycles, thereby interfering with the combat readiness of the units and organizations involved.

Petitioner's assignment to an organization located ashore does not make the considerations noted above any less pertinent. Although the degree of disruption would be diminished, practicality dictates that court-martial procedures be uniform and consistent, because servicemembers are at all times subject to reassignment according to the needs of the military. The rules at issue must apply world-wide and under conditions reasonably foreseeable during war as well as during peace. See generally *Chappell* v. *Wallace,* 462 U.S. 296, 300 (1983).

c. The ABA Committee on Criminal Justice and the Military recently examined the advisability of replacing the current military joinder rule with a rule similar to Fed. R. Crim. P. 8(a), as did the drafters of the *Manual for Courts-Martial, United States—1984.* Both the ABA committee and the drafters of the revised *Manual* concluded that it would be impractical and ill-advised to adopt such a change in military procedure. As the drafters of the revised *Manual* explained (*Manual for Courts-Martial, United States—1984,* App. 21, at A21-28):

> This rule is inconsistent with Fed. R. Crim. P. 8(a), which requires (in general) separate trials for each offense. Such a requirement is too unwieldy to be effective, particularly in combat or deployment. Joinder

is entirely within the discretion of the convening authority.[5]

This recent reaffirmation of the need for the military joinder rule makes judicial deference to the President's judgment as Commander-in-Chief all the more imperative. As this Court has recognized, civilian judges are ill-equipped to determine the impact upon military effectiveness of any particular intrusion upon military authority. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. at 301; *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). Particularly in the absence of any colorable claim of a constitutional violation (see pages 8-9, *infra*), the President's decision to maintain the military joinder rule is not a matter requiring civilian judicial scrutiny.[6]

2. a. Misjoinder does not, in any event, constitute a per se violation of due process even in the civilian sector. See, *e.g.*, *Robinson* v. *Wyrick*, 735 F.2d 1091, 1094 (8th Cir. 1984); *Corbett* v. *Bordenkircher*, 615 F.2d 722, 724-726 (6th Cir. 1980). Indeed, "no federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6

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[5]The extensive analysis of the ABA committee, which reached the same conclusion, is reproduced at App., *infra*, 1a-9a.

[6]Even if misjoinder were an error of constitutional dimension in the civilian sector, the same rule would not necessarily obtain in the military. As this Court has often recognized, many of the constitutional rights enjoyed in the civilian community cannot be accommodated in our system of military justice absent congressional direction to that end. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *O'Callahan* v. *Parker*, 395 U.S. 258, 261-264 (1969). For the reasons previously discussed, the civilian rule on joinder of offenses is incompatible with the needs of the military.

Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g., United States* v. *Seidel,* 620 F.2d 1006, 1013 (4th Cir. 1980) (misjoinder only "a violation of a mere procedural rule") (footnote omitted). The Court's discussion of the harmless error standard for nonconstitutional violations in *Kotteakos* v. *United States,* 328 U.S. 750 (1946), further suggests that improper joinder does not, in itself, violate the Constitution. Finally, there is of course no constitutional provision addressing joinder. If misjoinder is ever unconstitutional in a particular case, therefore, it could only be because the ensuing prejudice is so great as to deny a defendant a fair trial in contravention of the Fifth Amendment. But where no prejudice has arisen, no constitutional violation could possibly have occurred.

b. In the instant case, petitioner's only claim of prejudice is that the evidence admitted with respect to the assault charge tended to show petitioner's propensity for violence, thereby possibly inducing the members to reject his defense to the murder charge. See Pet. 9-10. On the facts of this case, petitioner's argument does not rise to the level of actual prejudice sufficient to constitute a denial of due process. The military judge instructed the members to consider each offense, and the evidence presented for each offense, separately and independently (Tr. 734):

> [Military Judge]: It has been emphasized earlier and I emphasize again, that Charge I and Charge II are completely separate. To emphasize this point, I will completely instruct you on the law regarding Charge I first, then I will instruct you on the law regarding Charge II. You are instructed to treat these two alleged incidences [*sic*] as completely independent and separate.

The military judge repeated this cautionary instruction even more explicitly by instructing the members to disregard the

government's rebuttal evidence, offered to refute petitioner's claim of self-defense on the assault charge, when they considered the murder charge (Tr. 751):

> [T]his is important, in this regard, you must completely disregard the testimony of Lieutenant Commander Nolan and Lieutenant Selak concerning the accused's reputation for peacefulness or unpeacefulness. This evidence was admitted only as to Charge II and the alleged incident on 20 November 81, for its tendency, if any, to show the accused's character at work at the Naval Hospital in that limited community, not in the community at large.
>
> In connection with Charge I, the alleged incident charged on 13 February, the shooting incident, you must not consider this evidence for any purpose. You must not infer from such evidence that the accused on this occasion had a violent disposition or any criminal propensity and that he, therefore, was the aggressor on the 13th of February or committed any offense alleged or included in Charge I.

There is no reason to believe that the members were unable or unwilling to obey the instructions. To the contrary, the military judge's instructions were clear, and the members must be presumed to have understood them and followed them. Moreover, the assumption that limiting instructions are followed has special force in the context of military trials. Court-martial members are selected, as required by Article 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), on the basis of their age, education, training, experience, length of service, and judicial temperment. Here, the members were active and conscientious participants in the trial. They took notes throughout the trial (see Tr. 200), asked the witnesses more than 30 questions (Appellate Exhs.

XXVII-XXXVII, XXXIX-XLVII) and specifically asked the trial judge numerous questions about the instructions in a sincere effort to understand what was required of them (see, *e.g.*, Tr. 737, 741, 742, 743, 745, 748, 750, 752, 753, 758). The conduct of the members permits no conclusion other than that they scrupulously followed all instructions. In these circumstances, petitioner's speculative assertion that the instructions were "fruitless" (Pet. 10) is contradicted by the clear evidence of record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

COMPARATIVE ANALYSIS

FEDERAL RULES OF CRIMINAL PROCEDURE AND MILITARY PRACTICE AND PROCEDURE

Prepared by the

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INTRODUCTION

The purpose of this Comparative Analysis is to provide to practioners of military justice some insight on how the Federal Rules of Criminal Procedure may be utilized in the court-martial process. Art. 36, Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 836) provides that the procedure, including modes of proof, in cases before courts-martial may be prescribed by the President and shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with the UCMJ. The U.S. Court of Military Appeals has held that ". . . Federal practice applies to courts-martial procedures if not incompatible with military law or with the special requirements of the military establishment." *United States v. Knudson,* 4 USCMA 587, 16 CMR 161, 164 (1954); *Chenoweth v. Van Arsdall,* 22 USCMA 183, 46 CMR 194 (1972); *United States v. Fisher,* 4 USCMA 152, 15 CMR 152 (1954).

However, to our knowledge, there has never been a study conducted to determine which federal rules are consistent with the UCMJ or MCM and therefore able to be used in court-martial procedure. This Comparative Analysis is such a study, and we hope will be the first step towards an increased awareness by practitioners of the authority, practicality and applicability of the federal rules in courts-martial. For example, Rule 17.1, Pretrial Conference, offers a procedure not contained in the MCM or UCMJ, yet

one which has been used by several military judges resulting in a greatly increased efficiency in the administration of justice. Other rules may be similarly used, resulting in a greater amount of flexibility in the court-martial process. We hope that this Comparative Analysis becomes a handy deskbook for practitioners and that they will use it and the Federal Rules of Criminal Procedure to expand and improve procedures before courts-martial.

Although the Committee on Criminal Justice and the Military of the ABA Criminal Justice Section initiated this study only with the above goals in mind, it comes at a propitious time. There is presently a project ongoing within the Department of Defense to revise the entire Manual for Courts-Martial. One of the goals of this project is to align MCM procedures more with the Federal Rules of Criminal Procedure. We hope that the Comparative Analysis is of some aid to this ambitious project. Following the Manual revision, it may prove of even greater value to practitioners.

We appreciate the support of the Criminal Justice Section, American Bar Association, which sponsors our committee and which graciously funded the printing of this treatise. Last, but not least, we appreciate the amount and quality of work on this project contributed by our fellow committee members listed herein, without whom this Comparative Analysis would not exist. These committee members are all busy lawyers or judges who have generously contributed their own time to this work.

It is our hope that this Comparative Analysis will, through the initiative and imagination of those who use it, contribute to the improvement of our system of justice.

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August, 1982

[18] Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offense charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

COMMENTARY

Rule 8(a) implicitly forbids joining offenses in the same indictment or information *unless* they are related by character, act, transaction, common scheme, or plan. Fed. R. Crim. P. 8(a). L. Orfield, *Criminal Procedure Under the Federal Rules, §* 8:19 (1966) (*Orfield*). Even when related, there is no *requirement* that any counts be joined. *Orfield* at 765. Even when major and minor offenses are related, the jury should be properly instructed. *Orfield §* 8:50.

The reason for the federal rule is a concern that the accused will be prejudiced by joinder of unrelated, serious offenses. *See e.g., Orfield, §§* 8:15 - 8:25; Fed. R. Crim. P. 14; *Cf. United States v. Lewis,* 626 F.2d 940 (D.C. Cir. 1980). For example, even where there is a related joinder there is concern that: the defense might become embarrassed or confounded in presenting separate defenses; that the jury might use evidence of one of the crimes charged to infer commission of another; and that the jury might accumulate evidence of various crimes charged to find the accused guilty on a count which, if considered separately, it would not so find. *United States v. Lewis, supra.*

[19] On the other hand, in the military justice system any number of diverse charges ordinarly *should be* joined (except that major and minor charges should *not* be joined). Paras. 27*c*, 30*g*, and 33*h*, MCM 1969 (Rev.).

This historical variation existed long before the UCMJ or Federal Rules of Criminal Procedure. *Orfield* at § 8:19; W. Winthrop, *Military Law and Precedents*, 152 (2d ed. 1920) (*Winthrop*); *Naval Courts and Boards*, § 20, (1937). The military has long recognized this divergence. *Winthrop*, at 152, notes:

> Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding.

The *Legal and Legislative Basis, Manual for Courts-Martial, United States*, 41 (1951) specifically commented on the difference between the federal rule and the military rule, and stated:

> What is desired in court-martial practice is the application of a reasonable rule.

The effect of joinder is different in the two systems. Under the federal system, a separate conviction and sentence may be had on each count. *Orfield* § 8:49. Courts-martial, however, adjudge "the *aggregate* of the limit of punishment for each separate and distinct offense." (Emphasis supplied). Para 127*c*, MCM, 1969 (Rev). *United States v. Keith*, 1 USCMA 442, 448-49, 4 CMR 34, 40-41 (1952); *United States v. Gutierrez*, 11 MJ 122 (CMA 1981).

There are many reasons why it is impracticable for Rule 8(a) to be adopted by the military justice system.

Courts-martial are courts whose jurisdiction is limited to certain defined individuals. Art. 2, UCMJ. If a service member is tried for one offense and awarded a bad conduct discharge, another trial would often be impractical but may

be necessary because of the seriousness of the offense. Under such circumstances, personnel and physical assets often will have to be doubled to arrive at a second conviction. *Contra,* C. Wright, *Federal Practice and Procedure,* § 143 (1969) (*Wright*). Further, the trial would be delayed—and, because the military justice system tries cases worldwide and transfers individuals frequently and on short notice, witnesses, counsel, and the accused will often not be available for a second trial. If [20] sentenced to confinement, the accused may not be serving confinement at the place of trial. To transfer such individuals back to the original trial situs would be disruptive to the efficient and effective disposition of cases and place unwarranted burdens upon commands (including those at the appellate level). Further, situations such as rapid deployment, unit movement, etc. may mean that it may be impossible to try the accused again. *See United States v. Keith, supra,* at 40; *United States v. Taylor,* 28 CMR 752 (ABR 1959). In any event, returning serious offenders to the situs of their original trial can often be extremely deleterious to high morale, good order, and discipline in the command.

The accused in the military justice system benefits from the joinder of offenses. *See United States v. Taylor, supra,* at 756. In most cases, the maximum punishment is limited by the jurisdiction of the court-martial while the actual punishment possible for the offenses is much greater. Arts. 19, 20, UCMJ. *See also United States v. Wahl,* 5 CMR 733, 737 (AFBR 1952). Even in the general court-martial, joinder of all known offenses can preclude a prior conviction that may aggravate or accelerate the maximum punishment. Paras. 75, 127, MCM, 1969 (Rev.). Further, it is more likely the sentences from one court-martial will be *less* than the aggregate sentence of two courts-martial. *United States v. Taylor, supra,* at 756. In general courts-martial, the Article 32 Investigation is a more effective vehicle to

weed out charges which should *not* be tried than the federal indictment. *See Moyer, Procedural Rights of the Military Accused,* 22 Maine L. Rev. 109-14 (1970). When groundless specifications do create prejudice, reversal will result. *United States v. Aronson,* 25 CMR 653 (ACM 1958).

The federal judicial system has recognized the desirability of "compelling the government to join all the charges it has against a single defendant. . ." *See Wright, supra,* at 313. The policy of the Department of Justice is to consolidate as many offenses as possible at a single trial. It is "a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *See Petite v. United States,* 361 U.S. 529, 531-32 (1960). Tentative draft No. 5 of the Model Penal Code of the American Law Institute recommends an increased joinder of offenses. However, liberal procedures for amendments to indictments would be required and federal indictments cannot be amended. *Orfield, Joinder in Federal Criminal Procedure,* 26 F.R.D. 23, 76-77 (1960); *Wright, supra, §* 143.

Consequently, not only would it be impracticable to incorporate Rule 8(a) into military procedure, but the military has the more desirable, modern practice.